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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205896
Party	Plaintiff Beau L. Tardy
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Opposition Proceeding 91205896

In the matter of Trademark Application No. 85509929

For the mark: DIZZY

Published for Opposition Date: June 5, 2012

Beau Tardy ('Tardy'), Opposer

v.

Wild Brain Entertainment, Inc. ('Wild Brain'), Applicant

**OPPOSER'S REPLY BRIEF**

Opposer Beau Tardy, hereby files this reply brief in support of its opposition to Applicant,  
Wild Brain's Application No. 85509929 for the mark DIZZY.

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## **I. ISSUES FOR REVIEW**

The only issues in the record are standing and lack of bona fide intent and the issue of what evidence is in the record for these issues. Both are threshold issues.

Applicant's introduction to its brief: "This is not a serious case" is contradicted by the record and the fact that this proceeding has already taken 4 years and 72 filings and contradicted by the fact that Applicant has filed for an oral hearing and filed numerous motions during the proceeding.

## **II. ARGUMENT**

### **A. STANDING**

The party challenging registration of the mark must allege a commercial interest in the same or a similar name; that is, the opposer must allege that it is at least in a position to use the alleged [trademark] in its business activities. See *Societe Civile Des Domaines Dourthe Freres v. S.A. Consortium Vinicole De Bordeaux Et De La Gironde*, 6 USPQ2d 1205 (TTAB 1988).

This is a very low threshold and burden.

Applicant admits in its answer at 4 TTABVUE 3 that Opposer is in a position to use DIZZY in its business activities in paragraph one where Applicant's rants over and over that Opposer is not doing a good job of using its mark. These criticisms include the sentence

“The only content on the website dizzythecat.com appears to be a few very short cartoons from 2006” and Applicant attaches these cartoons as Exhibit 6.

Applicant dismisses this answer as no longer being relevant because it amended its answer. As an admission against interest, under TBMP 704.06(a) statements in pleadings may have evidentiary value as admissions against interest by the party that made them. The admission against interest was supported by facts that Applicant viewed when looking through Opposer’s different URLs. The fact isn’t undone by a replacement pleading.

Publically available internet documents admitted by Opposer in its Notices of Reliance on their face show DIZZY products for sale by opposer. The specimens of use for Opposer’s application show opposer using DIZZY in commerce and show on their face that goods are available for sale and the archives show that they have been available for sale for years. These are not complicated documents. They are the same type of document that the USPTO accepts on a daily basis to show use in commerce. These were not business documents that require authentication.

Opposer’s burden for standing to assert the lack of bona fide intent on the part of Applicant only requires that Opposer has a commercial interest in the mark. Opposer has established this using several documents and Applicant’s admission against interest.

#### LACK OF BONA FIDE INTENT

Applicant is in a similar position to Opposer regarding not having taken testimony. But Applicant’s denials are supported by no evidence. Other than prosecution documents for the subject application and documents relating to another mark (UMIGO), there is no

documentary evidence reflecting any bona fide efforts by Applicant to begin use of the DIZZY mark in commerce for any goods and specifically not the goods in this application.

Applicant's brief states that it "had no need to submit testimony about its business or its planned trademark use."

This shows a basic lack of understanding regarding the lack of bona fide intent and the meaning of a denial in an answer. Applicant had a burden to support its denials and show bona fide intent for every good in its application. Applicant admitted in its answer and in discovery responses that some of the claims were true. This shifted the burden to Applicant to explain why there were no activities that showed a bona fide intent to use.

Precedent holds that the failure to show bona fide intent-to-use of any good in the class renders the entire Class, and in turn the entire application, void ab initio. This is a substantial burden to ignore.

Applicant never amended its claims to attack Opposer's application or maintained affirmative defenses. Applicant never pleaded an affirmative defense that Opposer was not the owner of the DIZZY mark. Opposer was never on notice that Applicant was asserting the issues that Applicant raises in its brief as its defense to the claim of lack of bona fide intent.

Applicant never attempted to amend its list of goods and services to reflect the evidence that it had available regarding its bona fide intent.

Applicant's only Notice of Reliance at 64 TTABVUE contains nothing whatsoever to carry its burden about DIZZY, the subject of this opposition. Applicant didn't take testimony to try to explain the lack of evidence which was its burden.

In its argument in its brief, Applicant chooses to single out 4 admissions amongst a total of 26 admissions (11-14) as not supporting Opposer's case, when in fact along with the 22 others, these very admissions are key to show lack of bona fide intent to produce the goods listed at the time of filing.

Specifically the Applicant is utterly incapable of proving that it intended to produce "hand held units for playing electronic games." Admission 14 actually provides the Applicant with the opportunity to prove bona fide intent, had it responded to Opposer's requests. Additionally if the Applicant had bona fide manufacturing or distribution plans this was its opportunity to present them (or simply admit to them).

Only the Applicant can contradict the 'theory' of no bona fide intent. It is not for the Opposer to prove the Applicant's bona fide intent. No documentary evidence was ever produced to show any bona fide intent despite the claim to the contrary by the Applicant.

Applicant's brief contains distress that Opposer didn't enter all the documents that it produced into the record. Applicant's document production contained only a promise to produce documents at some time. If Applicant had important documents to enter into the record, it had a burden to do this itself. If Applicant needed documents to support its case, it had an obligation to take testimony, verify documents and explain under oath the relevance

of pictures of a DIZZY character to bona fide intent to sell hand held units for playing electronic games and all of the other goods in the subject application.

Applicant didn't meet even its burden to show bona fide intent for even a single good in a long list. Applicant didn't amend its answer to assert any of the issues in its brief to put Opposer on notice of these issues. Opposer objects to all the unpleaded issues in Applicant's brief as improper unpleaded subject matter.

Applicant spent a lot of time in its brief discussing the Supplemental Disclosure made by Opposer yet Applicant never amended its answer to include any claims relevant to this disclosure. Any claims offered by Applicant in its brief are unpleaded claims and should not be considered.

### **III. CONCLUSION**

Seeking to leave all doors open, Applicant filed intent-to-use DIZZY applications in IC 9, IC 16, IC 25, and IC 28 for a long list of goods in each application. All but the IC 9 subject to this proceeding are abandoned by Applicant without a statement of use filed.

Applicant made and subsequently abandoned a word for word identical application for BIT (No. 85509856) all the while asserting in his own brief that "...particularly where (as here) none of the abandoned applications were for the same mark and the same goods."

It is not for the Opposer to prove the Applicant's intent when attempting to register a trademark as Applicant implies in his brief (page 13 "...nor did he establish Applicant's intent at the time those other applications were filed - which would be the more relevant inquiry"). It is rather for the Applicant to be able to prove his bona fide intent when applying for an intent-to-use mark. The Opposer must only be able to shift the burden to the Applicant in an



opposition to prove it. It is for the Board ultimately to decide whether there is a bona fide intent to use a mark, not the Opposer.

Applicant has shown no evidence whatsoever that it intends to file a Statement of Use for any of the goods in this proceeding. It has wasted Opposer's time and money and the Board's time arguing for the sake of winning while never making a single claim about a single good in the application.

Applicant has presented zero evidence of any DIZZY products. Applicant argues issues in its brief that are not supported by its pleadings.

Applicant has no documentary evidence supporting any efforts to actually develop, market or sell DIZZY products. Applicant has offered no objective evidence of concrete steps toward commercial use of the DIZZY mark or an explanation for the lack of evidence.

The subject application is void for lack of a bona fide intent to use the mark on all of the goods. Registration should be refused.

Submitted By: /Wendy Peterson/  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2016, the foregoing was served on Applicant's correspondents of record by email to:

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